SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 788

JAMES D. McCOLLOUGH, *Petitioner*

v.

THE TRAVELERS INSURANCE COMPANY
AND
LEVINGSTON SHIPBUILDING COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI

To The United States Court Of Appeals
For The Fifth Circuit

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The Petitioner, James D. McCollough, prays that a writ of certiorari issue to review the judgment entered in this case by the Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Texas, Beaumont Division, was entered on December 10, 1965 (Tr. 19-21), and is reported in 19 A.M.C. 1258. The opinion of the United States Court of Appeals for the Fifth Circuit was entered on August 9, 1967 and is reported in _____ F.2d.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 9, 1967. (Tr. 42-54). The jurisdiction of this court is invoked under 28 U. S. Code 1257(3).

QUESTION PRESENTED

Whether the Petitioner's injury occurred upon the navigable waters of the United States, thus entitling him to benefits under the Longshoremen's and Harborworker's Compensation Act, 33 U.S.C. 901 *et seq.*

STATUTES INVOLVED

The Statutes involved in this case are:

(a) Longshoremen's and Harborworker's Compensation Act, 1927, 33 U.S.C. 901, *et seq.*

(b) Admiralty Extension Act, 1948, 46 U.S.C. 740.

STATEMENT

This is an appeal from a final judgment of the Court of Appeals for the Fifth Circuit which reversed a decision by the Disrict Court of the Eastern District of Texas which had upheld the Deputy Commissioner's award of benefits under the Longshoremen's and Harborworker's Act, 33 U.S.C. 901 *et seq.*, to James J. McCollough, Petitioner herein.

The District Court for the Eastern District of Texas, Beaumont Division, Honorable Joe J. Fisher, U. S. District Judge, entered judgment December 10, 1965, for reasons stated in his memorandum opinion (R. 20-21, 1964 A.M.C. 1258). The insurance company filed an appeal.

The question. — The district court and the deputy commissioner both found the Petitioner to have been injured upon the navigable waters of the Sabine River in the course of his maritime employment as a ship repairman at Levingston Shipbuilding Company. (R. 4-8). The single question raised by this case is—

Whether injury to a shipyard worker repairing a vessel, when it occurs upon an outfitting pier which was floating upon the navigable waters of the Sabine River, is an injury "occurring upon the navigable waters of the United States" within the meaning and coverage of the Longshoremen's Act.

The Petitioner asks this Court to grant writ of certiorari and to reverse the court below so as to hold that the injury was upon the navigable waters including any drydock, and thus within the jurisdiction of the federal act.

The deputy commissioner's proceedings. — At the hearing before the deputy commissioner, the insurance carrier and employer contested the Petitioner's Longshoremen's Act claim on the grounds (1) that his injury was exclusively within the Texas Workmen's Compensation Act and therefore his acceptance of payment of the $35.00 per week Texas Act maximum was a full satisfaction of all of the Petitioner's rights, and (2) that the federal Act should not apply "because the wharf or floating pier has been stationary for some 15 to 18 years and is permanently affixed to the land."

With respect to the question of characterizing the injury as "occurring upon the navigable waters", Mr. McCollough testified in his own behalf (R. 24-31), and the insurer and employer called Mr. Cecil R. Beeson, the employer's Vice-President and Director of Industrial Re-

lations (R. 33-36). Also received in evidence was a chart of that part of the river on which the floating pier was located (R. 37).

Both witnesses agreed and the deputy commissioner found that claimant, in the course of repairing a barge, was working back and forth between the vessel afloat and the outfitting pier alongside and that his injury occurred while he was temporarily on the outfitting pier, which was a permanent structure, consisting of floating "work barges", extending from the land over, above and upon the navigable waters of the river. As its name implies, the outfitting pier was a fixed wharf used primarily for the purpose of repairing vessels (R. 33-36).

The Petitioner testified that the pier was composed of "work barges" floating on the river, but permanently attached to the land and held in place throughout its entire length by piling clusters driven into the river bottom. It was used for shipyard work, not loading or unloading, and had always remained fixed stationary in the place where it was built during some 15 to 18 years previous. He also testified that his "entire location was upon the navigable waters" although his duties as helper to a sandblaster working on vessels required him at times to work back and forth between the vessels and the piers alongside (R. 26-28). The injury to the Petitioner's back occurred when he slipped while taking a hundred pound sack of sand from a truck or van, situated on the pier, in order to feed the sandblasting machine which supplied his blaster who was working on a barge alongside. (R. 24-32).

Mr. Beeson, testifying for the employer, explained it had a number of piers, several of which were floating. He described this outfitting pier in detail. It was 750

feet long and consisted of four separate floating steel barges, permanently affixed to the land by piling clusters at intervals throughout the length of the pier (R. 34-35, 36).

On the question of Mr. McCollough's acceptance of the $35.00 a week Texas compensation payments as a binding election, release or waiver of his rights to federal benefits, the only evidence was his own testimony on cross-examination by the insurer and employer. He stated that although his attorney filed claims under both the Texas and federal Acts he accepted the $35 Texas payments because, as he put it, "I had to or starve" (R. 31-32). No testimony as to election was offered by the employer and carrier.

On this evidence the deputy commissioner held the injury to be covered by the Longshoremen's Act and credited the employer and insurer with the payments made under the Texas Act, as authorized by law. He accordingly awarded Mr. McCollough the difference between that amount and the amount to which he was entitled under the federal act.

The district court proceedings. — The employer and insurer appealed to the United States District Court for the Eastern District of Texas to set aside the award of federal benefis to Mr. McCollough as not in accordance with the law. It specified numerous grounds (R. 12-15) which may be summarized: (1) Petitioner's compensation was validly and constitutionally covered" by the Texas Workmen's Compensation Act; (2) Petitioner's work was non-maritime and his employer was not engaged in maritime employment on navigable waters; and (3) Petitioner was not injured on navigable waters but on a wharf and

any wharf, dock or pier permanently attached to land "is just an extension of the land not within the terms" of the Longshoremen's Act and the deputy commissioner's jurisdiction.

The Petitioner and the deputy commissioner cross-moved for summary judgment. The district court entered judgment for the deputy commissioner, summarizing the facts in his memorandum opinion (R. 20, 1966 A.M.C. 1258):

> The deputy commissioner found as a fact that the claimant was injured upon navigable waters while assisting in repairing a barge when feeding a sand-blasting machine. This is fully supported by substantial evidence in the record considered as a whole. The evidence shows the claimant was working on a floating outfitting pier and was permanently anchored to the shore and bottom of the Sabine River by piling clusters. Claimant was promptly paid compensation at the scale provided by Texas law, but brought his claim for the additional amount due under the federal Act. The deputy commissioner allowed full credit for all payments as provided by 33 U.S.C. 914(k).
>
> Literally, "navigable waters" must include all necessary working places alongside vessels undergoing repairs. This includes places such as the floating pier, supported on barges, here involved, which extend from the land over and upon the water alongside the vessels and which are used as the work goes on back and forth between the pier and the vessel being repaired. The situation of shipyard employees working on a floating pier alongside a vessel afloat is no different from that of the same employees while working on dry land alongside a vessel on a marine railway.

With respect to the applicable law, the memorandum continues (R. 20-21, 1966 A.M.C. at 1259):

> Of the latter our Court of Appeals has said in Holland v. Harrison Bros., 306 F.2d 369, 372 (5th Cir. 1962), "any meaningful definition of marine railway should include the land immediately adjacent," and earlier in Maryland Casualty Co. v. Lawson, 101 F.2d 732, 733 (5th Cir. 1939), it said such adjacent land was included because "the land was part of the yard necessary to the operation of marine railway." Cf. Dixon v. Oosting, 238 F. Supp. 25, 29 (E.D. Va. 1965); United States v. Yee Nee How, 105 F. Supp. 517, 521-522 (N.D. Calif. 1952).

The insurer and employer appealed the decision of Judge Fisher to the Court of Appeals for the Fifth Circuit. Briefs were submitted to the court and oral arguments were held on February 24, 1967. In an opinion rendered by Goldberg, Circuit Judge, on August 9, 1967, the Court of Appeals reversed the decision of the District Court for the Eastern District of Texas and held that the petitioner did not have a claim under the Longshoremen's and Harborworker's Compensation Act, whereupon the petitioner appealed to this court for a writ of certiorari to review the decision of the lower court.

REASONS FOR GRANTING THE WRIT:

For a long period of time there has been considerable confusion in the lower Federal Courts over the overlapping jurisdiction of the Longshoreman's and Harbor Worker's Compensation Act and various state Workmen's Compensation laws. There have been numerous lower court decisions which have either held or denied federal jurisdiction, depending on particular fact situations. The num-

ber of these decisions is growing, and with each decision the confusion is compounded. Arguments for and against federal jurisdiction can be made by citing the same decisions. It has been long settled that there is a "twilight zone" where both the state and federal acts can apply, but there has never been a clear definition of the exact area of overlapping jurisdiction. There is no decision which defines the limits of federal jurisdiction under the Longshoremen's and Harborworker's Compensation Act. This case presents this Honorable Court with the opportunity to clear up the confusion that now exists regarding federal jurisdiction, and to put to rest the lively controversy that is raging between scholars, judges and attorneys.

Since this Court's decision in *Calbeck v. Traveler's Insurance Co.*, 370 U.S. 114, 82 S. Ct. 1196 (1962), it has been settled that the federal act is operative when state acts can be applied, and that coverage under the federal act is precluded only if the injury occurs outside the admiralty jurisdiction. It is undisputed that the location of the petitioner's injury was within the admiralty jurisdiction, but the act (Section 3 (a), 33 U.S.C. 902(a) also provides the benefits are payable "only if the disability or death results from an injury occurring upon the navigable waters of the United States". The question in this case is whether the respondent's injury occurred on the "navigable waters of the United States". There has been considerable controversy over what that language means, and a decision by this Court clearly defining "navigable waters of the United States" is badly needed. This case presents this Honorable Court with the opportunity to give such a definition.

Until reversed by the recent decision of the Court of Appeals for the Fifth Circuit, the petitioner had prevailed

before the Deputy Commissioner and the District Court in his position that his injury came within the jurisdiction of the federal act, and he submits that the court below erred in its decision. In this regard, the petitioner presents three points to this Court in support of his position. They are:

1. That his injury is within the jurisdiction of the Longshoremen's and Harborworker's Compensation Act because he was engaged in Maritime employment within the Admiralty Jurisdiction of the United States.
2. That in any event (even though the petitioner urges the broader doctrine), an injury occuring upon a floating outfitting pier is an injury upon the navigable waters within the meaning and coverage of the Longshoremen's Act.
3. That at any rate, the injury here occurred within the twilight area of legitimate doubt where the statutory presumption of coverage supports the petitioner's election and the deputy commissioner's award.

The petitioner will present written argument to the court with appropriate authority on each of these points in the order above listed.

I.

That his injury is within the jurisdiction of the Longshoremen's and Harborworker's Compensation Act because he was engaged in maritime employment within the admiralty jurisdiction of the United States.

The position of the Petitioner is that those engaged in maritime employment which come under the admiralty

jurisdiction of the United States are also under the jurisdiction of the Longshoremen's and Harborworker's Act. It is now no longer questioned that any longshoreman engaged in the loading or discharging of cargo vessels is "doing work in the service of the ship". This is now accepted law as announced in *Thompson v. Calmar Steamship Corporation,* 216 F. Supp. 234 (E.D. Pa. 1963), aff'd. 331 F.2d 657 (3rd Cir. 1964), cert. den. 379 U.S. 913, 85 S. Ct. 259; *Spann v. Lauritzen,* 344 F.2d 204 (3rd Cir. 1965); *Huff v. Matson Navigation Company,* 338 F.2d 205 (9th Cir. 1964); and *Gutierrez v. Waterman Steamship Corp.,* 373 U.S. 206, 83 S. Ct. 1185 (1963). The common sense rule seems to be that a longshoreman or ship repairman (such as McCollough) who is injured in the performance of work in any sense maritime in nature should come under the provisions of the Longshoremen's and Harborworker's Act. This is not only a sound rule of law, but any other rule would be inconsistent.

Longshoremen's Act jurisdiction over injuries occurring on a dock on navigable waters in the course of maritime employment of loading, unloading or servicing a vessel alongside the dock exists under admiralty jurisdiction as expanded by the principle laid down by this Court in *Gutierrez v. Waterman Steamship Corp.* (supra) and *Davis v. Department of Labor and Industries,* 317 U.S. 249, 63 S. Ct. 225 (1942).

The Admiralty Extension Act of 1948 provides that admiralty jurisdiction includes ". . . all cases of damages or injury to person or property, caused by a vessel on navigable waters *notwithstanding that such damage or injury be done or consumated on land*" (emphasis added),

and shall be determined "according to the principles of law and rules of practice obtaining the cases where the injury or damage have been done and consumated on navigable waters". In *Gutierrez*, this Court interpreted the Act as applying to all dockside injuries arising out of and in the course of a longshoreman's employment in the service of a vessel upon navigable waters along a wharf. This Court expressly rejected the contention that the Admiralty Extension Act applied to only "injuries actually caused by the physical agency of the vessel or a part of it". It held the act applied whenever the injury arose out of the "service of the ship" as a result of the impact felt on the adjacent dock.

Thus, in cases of a dockside injury of a longshoreman while in the scope of his employment of unloading or discharging cargo, this Court interpreted the Admiralty Extension Act as clearly applicable because the injury was caused by the Employee's maritime employment in the service of the ship.

Decisions prior to the Admiralty Extension Act cannot be of great help, as was noted by Judge Harrison L. Winter in *Boston Metal Company v. O'Hearne*, United States District Court of Maryland, June 20, 1963, U.S. D.C. (Dist. of Md.) Admiralty No. 4412; aff'd 329 F.2d 504 (4th Cir. 1964).

> "I think the Calbeck case equates, I think the legislative history (of the Longshoremen's Act) supports, and I think the decisions in this Circuit also support the concept that navigable waters of the United States means the admiralty jurisdiction of the United States, wherever it may be from time to time.
>
> . . . (T)rue, the Admiralty Extension Act was not passed until after the Longshoremen's and Harbor-

> workers' Compensation Act was passed, but I think that the Calbeck case makes perfectly plain that the application of the Longshoremen's and Harborworkers' Act was not to be frozen to the admiralty jurisdiction of the United States as it then existed in 1927, or as it was considered then to exist, but that rather there may be read into the Longshoremen's and Harborworkers' Act a more flexible concept that under subsequent legislation (by the Admiralty Extension Act) or as a result of subsequent Court decisions, the admiralty jurisdiction of the United States is being expanded and the application of the Longshoremen's and Harborworkers' Act expands along with it."

This apparently is the reasoning of this Court in interpreting the Extension Act as evidenced by its discussion of the "unseaworthiness" doctrine in *Gutierrez*. This Court earlier recognized that both ships and wharves are on the water, and held the Jones Act applicable equally to dockside injuries and maritime employment as well as to those on board. There is no reason for not carrying out the congressional intention that the benefit of federal legislation for the maritime workers should be extended to the fullest extent of congressional power by giving a liberal and consistent reading of the words that Congress employed.

This Court has often stated that the Longshoremen's and Harborworker's Act must be interpreted so as not to bring about a harsh and incongruous result. It would seem indeed inconsistent to have two longshoremen or maritime workers injured or killed during the course of their employment, one standing on the deck of the vessel, and one on the dock, to have one of his family protected under the uniform provisions of the Longshoremen's and

Harborworker's Act and the other relegated to the provisions of various state compensation acts where the ship happens to be located at the particular time. This Court stated in *Reed v. The Yaka*, 373 U.S. 410, 83 S. Ct. 1349 (1963):

> "We have previously said that the Longshoremen's Act must be liberally construed in the conformance with its purpose, and in a way which avoids harsh and incongruous results. We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service."

It is submitted by the Petitioner that the "piers are extension of land" doctrine is historically erroneous and factually illogical when applied to defeat jurisdiction under the Longshoremen's Act. By reason of recent decisions and statutory law in the maritime field, it is no longer necessary to argue theoretically in support of that position. Because of the Admiralty Extension Act and the increasingly liberal holdings of this Court in the longshoremen third party and compensation cases, it is obvious that the old restrictive admiralty concepts are being discarded and broad new ones adopted. The Petitioner submits that the Longshoremen's Act must keep the pace of the times and as Judge Winter points out, its application must move along with the expanding admiralty jurisdiction of the United States.

The Petitioner submits that the Act should be applied with the utmost liberality. Reasons should be sought by

the Commission to grant awards under the umbrella of the coverage of the Longshoremen's and Harborworker's Act, and previous decisions and arguments which support the technical and overly legalistic argument "on the ship or gangway, federal, — on the pier, state" should be put to rest once and for all. Such technical distinctions do violence to:

(a) The legislative history,
(b) The protective purposes of the Longshoremen's Act,
(c) The long established principles of the interpretation of remedial statutes,
(d) The phenomenal growth of admiralty concepts in the almost forty years since the enactment of the Longshoremen's Act,
(e) The expansive influence of the extention of admiralty act, and
(f) The controlling authority of recent decisions.

The key words of jurisdictional coverage is "upon navigable waters" and not the restrictive "upon a ship"; or "floating free", or any other comparable interpretations that may be contended for by the insurer or employer. In selecting the expression "upon navigable waters", Congress did not intend to freeze the Act's coverage in conformity with the pre-1927 court decisions as to the extent of admiralty jurisdiction of dockside injuries any more than to concretize the "local concern" exception of that era. This Court explained in *Calbeck v. Travelers Ins. Co.* (supra):

> "In sum, it appears that the Longshoremen's Act was designed to insure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the sources, state or federal, of that remedy."

The Petitioner submits that all previous distinctions between injuries occurring on ships and between those on docks, wharves or piers be abolished, and asks that this Honorable Court reverse the Court of Appeals and hold that the maritime jurisdiction of the United States and the jurisdiction of the Longshoremen's and Harborworker's Act are synonymous.

II.

That in any event (even though the Petitioner urges the broader doctrine), an injury occurring upon the floating outfitting pier is an injury upon the navigable waters within the meaning and coverage of the Longshoremen's Act.

The Petitioner was injured while in the maritime employment of repairing a vessel; and the injury occurred upon an outfitting pier which was floating upon the navigable waters (approximately 32 feet deep) of the Sabine River. Since this "pier" actually consisted of connected "working barges", floating on those waters, it would seem apparent, as a matter of the natural use of the English language, that his injury was one "occurring upon the navigable waters." The Petitioner submits that Congress used that term in its natural sense, so as to provide coverage under the Longshoremen's Act to ship repairmen for injuries they receive while employed upon navigable waters. This case involves the same principle as in *O'Keeffe v. Atlantic Stevedoring Co.*, 354 F.2d 48, 50 (5th Cir. 1965), where the court said:

> An award under the Act is to be sustained if it can be supported by a reasonable argument. *Holland v. Harrison Bros.*, 306 F.2d 369 (5th Cir. 1962). The

> argument supporting the commissioner's award in this case seems not only reasonable, it appears to be conclusive.

The Act's background, purpose, language and prior interpretation all support the validity of the award of federal benefits here.

The occasion and necessity for the Longshoremen's Act were a series of cases decided by the Supreme Court concerning the application of state law within the admiralty jurisdiction. In *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917) the Court ruled that federal maritime law occupied the area of admiralty jurisdiction conferred upon the federal government by Article III, Section 2, of the Constitution; and held that state workmen's compensation laws could not constitutionally be applied to an injury occurring upon navigable waters within the federal admiralty jurisdiction to an employee engaged in maritime employment, because to do so would destroy the uniformity of the federal maritime law which the Constitution was intended to establish. The employee injured in *Jensen* was a longshoreman engaged in unloading cargo, and the injury was sustained on a gangplank over navigable waters between the vessel and the wharf. 244 U.S., at 208; see *Calbeck v. Travelers Ins. Co.,* supra, at 370 U.S. 114, 117. Two federal statutes designed to permit the application of state workmen's compensation statutes to injuries in maritime employment upon navigable waters were later held to be unconstitutional. *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920); *Washington v. Dawson,* 264 U.S. 219 (1924).

Perhaps in heed of the criticisms leveled at its decision in *Jensen and Knickerbocker,* and in recognition of the

harsh results engendered by them, this Court formulated the "local concern" doctrine which permitted workmen to recover under state workmen's compensation laws for injuries occurring upon navigable waters within the admiralty tort jurisdiction, provided that the activities and contracts of maritime employment of the employees affected were matters of mere "local concern", not directly related to navigation or commerce. This court reasoned that in such circumstances the application of state procedures and remedies would not destroy the uniformity of the federal maritime law required by the Constitution. *Grant Smith-Porter v. Rohde*, 257 U.S. 469 (1922).

At the same Term, this Court held that state workmen's compensation could be applied, without reference to the "local concern" doctrine by direct operation of state law for injuries occurring upon extensions of land into navigable waters, such as piers and wharves, because injuries upon land and such extensions of land were within the recognized non-maritime area of state jurisdiction. *Industrial Commission v. Nordenholt*, 259 U.S. 263 (1922) (injury to longshoreman working on a pier).

In the context of these decisions, the Longshoremen's Act was drafted and adopted. As originally drafted, and sponsored by the International Longshoremen's Association and unions representing ship repairmen and allied trades, the bill would have applied to "any employment performed *on a place* within the admiralty jurisdiction of the United States, except employment of local concern and of no direct relation to navigation or commerce * * *." Hearings on S. 3170, Senate Judiciary Committee 69th Cong., 1st Sess., p. 2 (hereafter "Senate Hearings"). In that form, the bill was apparently designed to provide coverage only for injuries within the admiralty juris-

diction which were not compensable under stateworkmen's compensation acts, whether applying to their own force or under the new "local concern" doctrine.

Both the Senate and House reports made clear the Congressional intent to provide compensation coverage for workers injured in the course of repairing vessels. S. Rep. 973, 69th Cong., 1st Sess., p. 16, H. Rep. 1190, 69th Cong., 1st Sess., p. 1. And the particular concern of Congress that such workers' injuries be included within the coverage of the Act is demonstrated by the parenthetical phrase "including any drydock" which it appended to the words "upon the navigable waters of the United States." For by making the test of coverage "upon the navigable water of the United States (including any dry dock)", Congress made clear its intent to cover all injuries upon drydocks (the facility) traditionally and most commonly used for repairing vessels, even if there might be some doubt as to whether a drydock was otherwise "upon navigable waters."

As the statutory language and legislative history imply, and *Calbeck v. Travelers Ins. Co.*, (Supra), has now held, this limiting clause was not designed to exclude from federal compensation coverage injuries occurring in maritime employment within traditional admiralty jurisdiction, but to which the traditional "maritime but local" or the new "local concern" doctrines had permitted the substitution of state compensation remedies. The Congressional purpose was, as the Court notes, "to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." 370 U.S. at 117. The Longshoremen's Act plus thus applies to all injuries oc-

curring in maritime employment upon navigable waters even though, because of the nature of the employment or the place of injury, the admiralty law had permitted state workmen's compensation statutes to be applied to such injuries in maritime employment under the local concern doctrine.

Since the employer here was concededly one whose employees are engaged in maritime employment upon the navigable waters, and the injury here was one which concededly arose out of the Petitioner's employment on navigable waters as a ship repairman, the only issue as to the coverage of the Act is whether his injury occurred at a place which is "upon the navigable waters of the United States (including any drydock)" within the meaning of the Longshoremen's Act. As we noted above (*supra,* pp. 3-4, 7) the deputy commissioner and the Court ruled, the physical facts, which show that the injury occurred on a "working barge" which was floating on approximately 32 feet of water of the navigable waters of the Sabine River, indicate clearly that the answer to that question is affirmative. That the "work barge" was tied to other "work barges" to form a floating outfitting pier, attached to the land and held in place by pilings, does not detract from those physical facts. When an injury occurs to a worker on a vessel or other structure supported by the navigable waters of the United States, that injury occurs "upon the navigable waters" within the meaning and coverage of the Act. *O'Keeffe v. Atlantic Stevedoring Company,* (supra), 354 F.2d at 48, 50 (injury to longshoreman, occurring over a wharf, held covered by the Act, because he was being lifted by the ship's gear).

The purpose and legislative intent equally support the views of the deputy commissioner and the district court. For, as we have shown, Congress intended the Longshoremen's Act to cover all injuries to amphibious workers upon navigable waters, and was particularly careful to include the phrase "including any dry dock" so as to be sure to provide a remedy under the Act in all cases for ship repairmen, who usually perform their duties about such structures. And while the outfitting pier here was not a traditional form of "dry dock", it had a similar function (*i.e.*, the repair of vessels). See *Avondale Marine Ways v. Henderson,* 346 U.S. 366, 367 (1953), (concurring opinion); *Port Houston Iron Works v. Calbeck,* 227 F. Supp. 966, 967 (S.D. Tex. 1964). Thus, as the court below noted, if injuries to ship repairmen occurring in a graven drydock on dry land or upon the dry land alongside a maritime railway are injuries "upon navigable waters of the United States (including any dry dock)", so as to be within the coverage of the Longshoremen's Act, it is difficult to see why injury upon an outfitting pier, which is floating upon the navigable waters, is not equally an injury "upon navigable waters (including any dry dock)", covered by the Act. *Holland v. Harrison Bros.,* (supra), *Avondale Marine Ways v. Henderson,* (supra), *Maryland Casualty Co. v. Lawson,* 101 F.2d 732, 733 (5th Cir. 1939); *Continental Casualty Co. v. Lawson,* 64 F.2d 802, 805 (5th Cir. 1933).

None of those considerations apply to the floating "outfitting pier" which was the locus of the injury here. Since such structures, like many drydocks, float upon the navigable waters and are used for the repair of vessels, it was not at all certain that they would have been considered within the compensation jurisdiction of the states

at the time of the passage of the Act. On the contrary, since they floated upon navigable waters, injuries in maritime employment upon them were probably within the traditional maritime tort jurisdiction. And since the repair of vessels was traditionally work subject to admiralty contract jurisdiction, it is probable that, prior to 1927, the Court would have held that the federal admiralty remedies were exclusive of state compensation. E.g., *Great Lakes D. & D. Co. v. Kierejewski,* 261 U.S. 479 (1923); Messel *v. Foundation Co.,* 274 U.S. 427, 434 (1926).

The coverage of the repairman's injury here thus falls clearly within the overall Congressional purpose of providing a compensation remedy for all those injuries for which the prior Supreme Court decisions "had rendered questionable the availability of a state compensation remedy." *Calbeck v. Travelers Insurance Co.,* (supra). And while we have found no legislative history pertaining specifically to shipyard structures of this kind, both the particular regard of Congress for ship repairmen and the broad statutory language "upon the navigable waters of the United States (including any dry dock)" confirm the Congressional intent to cover repairmen's injuries occurring upon them.

The Petitioner submits that a shipyard employee who performs his work on a floating barge which is anchored by piling is no different from a man that does precisely the same job on a marine railway. The mere fact that the location of such repair facilities are not identical should have no bearing on whether or not there is coverage under the Act; the fact that the men involved do the came type of work should make a distinct difference. The Petitioner submits that it would be manifestly unjust to hold that a man injured while working on a sandblast-

ing operations on a marine railway is covered by the Longshoremen's and Harborworker's Act, and that a man working on a sandblasting operations on a floating barge anchored by pilings is not.

In *Holland v. Harrison Bros.*, supra, which Judge Fisher cited in his opinion, this Court held that a sandblaster working on a marine railway four hundred feet from the shore was covered by the Act, even though he was on land next ot a marine railway. The Court said "any meaningful definition of marine railway should include the land immediately adjacent". The *Holland* case comes within the "including any drydock" provision of the Act, and this case concerns the construction that should be given to "Navigable Waters", but the act must be given a liberal construction in order to avoid inconsistencies. As stated by this Court in *Reed v. The Yaka*, supra, and previously quoted:

> "We have previously said that the Longshoremen's Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service."

The same principle should be applied to workers doing the same job.

The *Reed v. Yaka* rule was recognized in *Holland*, and the Petitioner respectfully submits that it should be recognized in this case.

Petitioner contends that injuries on piers, docks, floating barges and other such extensions of land "are over, above, in and upon the navigable waters" and are plainly with the coverage of the Federal Act. In *Dixon v. Oosting*, (supra), which involved an injury on a piling cluster not yet incorporated into a bridge, the Court said:

> "Unless the Longshoremen's Act must be so strictly construed as to mean that there can be no compensable injury unless the injured party comes in contact with the water—a statement that needs no citation of authority to refute—the injury was clearly compensable under the Federal Act."

The present case of a floating dock is an even stronger case than *Dixon*.

It is also familiar that, because they are extensions of land, over, above, in and upon navigable waters, piers and their equipment, such as hoppers, cranes, etc., used in loading cargo or by persons going to and from the vessels, are appurtenancies within the ordinary conception of vessels on navigable waters. Thus in *United States v. Yee Nee How*, 105 F. Supp. 517 (N.D. Calif. 1952), the Court said:

> "Here, for the purposes of a statute assigned to effectuate enforcement of the customs laws, the word 'vessel' includes the pier to which a vessel is tied up. The 'spirit' of the law controls the 'letter' when the two are in conflict."

The sole requirement of the statute is that the incident occur upon the navigable waters.

It would be strange to hold that Congress in employing the expression in the 1927 Act intended to exclude those

injuries occurring upon a dock on navigable waters and to include only those occurring on a ship on navigable waters. Both ships and wharves and floating docks are on the water. There are a number of cases supporting the common sense statement that "upon" does not necessarily mean "afloat", but also "along", "adjoining", "adjacent to", or even "near". Thus, "a wharf or a pier is a place on a river or other navigable waters", *Meyers v. Kansas City,* 323 Mo. 200, 18 S.W.2d 900 (1929); "piers are confined to navigable waters" *In Re: Waterfront,* 122 Misc. 863, 205 N.Y.S. 56 (1924); *City of Oakland v. Hogan,* 41 C.A.2d 333, 106 Pacific 2d 987 (1940). Injuries on a dock or a wharf upon navigable waters is as much upon navigable waters as is an injury on the deck of a ship. A liberal, practical application of the Longshoremen's Act should be that its coverage is co-extensive with the broadest meaning of the statutory phrase, "upon navigable waters". Such a construction is in line with the repeated injunction of this Court to a liberal, non-technical construction of the Act. (*Reed v. The Yaka,* supra)

The time-worn, old arguments which attempt to distinguish between different types of piers, docks and wharves or between different types of mechanical apparatus which happen to be in use at the time of a man's injury should be rejected by this Court. It is unthinkable that Congress intended to make such technical and legalistic distinctions when the Act passed in 1927. The statement made in explanation of the bill by Congressman La Guardia of New York, on March 2, 1927, just two days before the Longshoremen's and Harborworker's Act became law is particularly apt:

> "Mr. Speaker, it is quite possible to explain the purpose and necessity of this bill in two minutes. . . .

> Owing to our dual form of government we find that longshoremen are employed by companies or individuals engaged in foreign or interstate commerce, and therefore, there is some question whether or not state law could be made applicable to them. In order to meet this situation, it is necessary to pass a federal law. This is what they are doing now. This law simply gives the longshoremen the benefit of up-to-date legislation *to cover injuries sustained in the course of their employment. That is all there is to it.*" (68 Cong. Record 5414)

This clear statement has been rejected as too liberal for over forty years, and parties have resorted to unbelievable gyrations in order to get around the intent of the Act. The floating dock which is the subject of controversy in this case is literally upon navigable waters, and the Petitioner asks this Honorable Court to affirm the District Court's decision holding that James D. McCollough's injury is within the jurisdiction of the Longshoremen's and Harborworker's Compensation Act.

III.

At any rate, the injury here occurred within the twilight area of legitimate doubt where the statutory presumption of coverage supports the claimant's election and the deputy commissioner's award.

For the foregoing reasons, the petitioner submits that his injury in this case, occurring over, above and on the navigable waters, upon a "work barge" supported by the floating on those waters, was clearly an injury occurring "upon the navigable waters" within the meaning and coverage of the Longshoremen's Act. If any doubt remains, however, it should be resolved in favor of sustaining the

deputy commissioner's award, and the claimant's choice of Longshoremen's Act compensation.

In *Davis v. Department of Labor* (supra), this Court recognized that the prior decisions concerning the scope of federal admiralty jurisdiction had created for the amphibious maritime worker a "twilight zone" where it was "extremely difficult" to determine whether the state or federal compensation remedy was applicable. 317 U.S. at 253, 256. If the worker were forced to choose between the two in advance, he would face not only the serious financial loss and delay of litigation, but also the possibility of having his claim barred by limitations if he chose erroneously. 317 U.S. at 254. This dilemma would frustrate the very purpose of workmen's compensation, which was to provide a swift, certain and inexpensive remedy. To avoid that dilemma, this Court relied upon two presumptions: the presumption of the constitutionality of state workmen's compensation law to sustain a claimant's choice of the state remedy; and the statutory presumption of coverage, Sec. 20(a), 33 U.S.C. 920(a), to sustain a claimant's election of compensation under the Longshoremen's Act. 317 U.S. at 254, 256-257. Accordingly, the Supreme Court ruled, a deputy commissioner's decision that "a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error." 318 U.S. at 256-257.

As this Court later observed, this "twilight zone" doctrine announced in *Davis,* gave the workers injured within it the right to recover compensation under either the Longshoremen's Act or the workmen's compensation law of the state. *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273 (1959). And, in every case presented to

it thereafter, the Supreme Court has sustained the claimant's recovery. See e.g., *Avondale Marine Ways v. Henderson,* supra, where the Court in a *per curiam* opinion citing the *Davis* case, *supra,* sustained a deputy commissioner's award under the Longshoremen's Act for an injury to an employee who was killed while engaged in the repair of a barge which was on a marine railway on dry land, approximately 400 feet from navigable waters; *Calbeck v. Travelers Ins. Co.,* supra.[1]

The exact scope of the "twilight zone" has never been authoritatively defined by this Court, and a definition is needed. The area was in all probability designed to include within a wide circle of doubt all waterfront cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way." *Moore's Case,* 323 Mass. 162, 167, 80 N.E.2d 478, aff'd *per curiam sub. nom. Bethlehem Steel Co. v. Moores,* 335 U.S. 874 (1948).

The petitioner here was injured, while engaged in repairing a vessel, when he was on a structure which was floating upon the navigable waters. While that structure was denominated as a "pier", it was in fact simply a series of connected "work barges", floating upon the Sabine River. And while it bears some resemblance to a traditional pier, neither its physical characteristics nor its function was that of a traditional cargo pier or wharf. For in both these respects, it more closely resembled a drydock, injuries upon which, of course, are expressly cov-

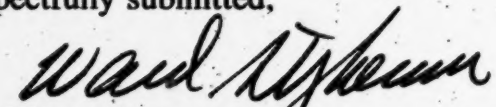
1. In *Calbeck,* itself, of course, the injury was on a vessel afloat upon navigable waters. It was therefore conceded that the injury occurred upon navigable waters, and within the admiralty tort jurisdiction. There was, therefore, no occasion for the Supreme Court to rely upon the twilight zone doctrine to sustain federal jurisdiction of the place of injury.

ered by the Act. For these reasons, as more fully stated above (*supra*, pp. 3-4, 7, 16), the petitioner believes that the injury here occurred "upon the navigable waters of the United States (including any dry dock)" within the meaning and coverage of the Act. Surely, in these circumstances the deputy commissioner has authority to effectuate the remedial purposes of the Act. His ruling was not one of "apparent error", and should be sustained. *Davis v. Department of Labor*, supra; *O'Keeffe v. Atlantic Stevedoring Co.*, supra.

CONCLUSION

In order to clarify the issue of the jurisdiction of the Federal Longshoremen and Harborworkers' Compensation Act and in order to determine the meaning of "navigable waters of the United States" as set out in that act, and to resolve the conflict between the many existing decisions regarding jurisdiction, this petition for a writ of certiorari should be granted.

Respectfully submitted,



WARD STEPHENSON,
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APPENDIX

IN THE

Supreme Court of the United States

October Term, 1967

NO. 788

JAMES D. McCOLLOUGH, *Petitioner*

v.

THE TRAVELERS INSURANCE COMPANY

AND

LEVINGSTON SHIPBUILDING COMPANY,
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To The United States Court Of Appeals
For The Fifth Circuit

WARD STEPHENSON,
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OPINION

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23492

THE TRAVELERS INSURANCE COMPANY and LEVINGSTON SHIPBUILDING COMPANY,
Appellants,

versus

R. J. SHEA, Deputy Commissioner, and JAMES D. McCOLLOUGH,
Appellees.

Appeal from the United States District Court for the Eastern District of Texas.

(August 9, 1967.)

Before GEWIN, COLEMAN and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge: This is a suit to enjoin the enforcement of an award made under the Longshoremen's and Harbor Workers' Compensation Act, 33 USCA §§901-950. The facts are simple and undisputed. James D. McCollough, an employee of Levingston Shipbuilding Company, was injured while assisting in repairing a barge when feeding a sandblasting machine. At the time of injury, he was working on a floating outfitting pier, which

consisted of floating steel barges tied end to end, approximately 750 feet long and connected to land by a 90 foot ramp, which had been permanently anchored to the shore and bottom of the navigable Sabine River by clusters of piling for eighteen years. Claimant McCollough was paid compensation at the scale provided by Texas law but brought his claim for the additional amount due under the federal Act. The Deputy Commissioner, finding that the injury occurred while claimant was "upon the navigable waters of the United States (including any dry dock)" within the meaning of the Act,[1] entered an award under the Longshoremen's Act and allowed full credit for payments made under the Texas act as provided by 33 USCA §914(k). Levingston and its insurer filed this suit seeking a mandatory injunction to set aside the award of the Deputy Commissioner as authorized by 33 USCA §921(b) and 5 USCA §1009(e) and from a dismissal of their complaint have filed this appeal.

We have for resolution the singular question of whether McCollough's injury, which occurred on the floating outfitting pier described above, was an injury "occurring upon the navigable waters of the United States (including any dry dock)" and as such properly comes within the jurisdiction of the Longshoremen's Act. Our duty is logged and compassed. In the absence of substantial evidence to the contrary, we must presume that the claim is covered by the Act. 33 USCA §920, *O'Leary v. Puget*

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[1] Coverage under §903 is provided for in pertinent part as follows:
"(a) Compensation shall be payable under this chapter . . . only if the disability or death results from an injury occurring upon the navigable waters of the United States (Including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

Sound Bridge and Dry Dock Co., 9 Cir. 1965, 349 F.2d 571; *Marine Stevedoring Corporation v. Oosting*, E.D. Va. 1965, 238 F. Supp. 78. Concluding as we do, however, that there is no evidence to support the conclusion that McCullough was injured upon the navigable waters of the Sabine, we reverse the case.

The ratio decidendi in those cases interpreting §903(a) is a beacon to us here. The coverage of the Act is not keyed to function but has uniformly been situs-oriented. As our Court held in *O'Keefe v. Atlantic Stevedoring Company*, 5 Cir. 1965, 354 F.2d 48, 50:

> "The difficult problem is the determination as to the place where the injury occurred. It is the place where the injury occurred that determines whether there is Longshoremen's Compensation coverage."

The Act does not cover all harbor workers, or all those working on ships, or those performing services to ships. These words would be the actuating words if functionalism were to prevail over locus. Congress set out to cover workers not protected by state workmen's compensation laws, but there is a void, a so-called twilight zone, between navigable and non-navigable waters. Since there exists hybrid employment with labors terrestrial and maritime and since state coverage does not preclude federal coverage, *Colbeck v. Travelers Insurance Co.*, 1962, 370 U.S. 114, 8 L.Ed.2d 368, 82 S. Ct. 1196, we do have the paradox of two workers doing the same type of work a few feet apart receiving injuries in the same way, yet treated as legal strangers. The paradox is not judicially soluble unless we extirpate the words "upon . . . navigable waters . . . (including any dry dock)" from

the statutory commandment, which we are forbidden to do. Instead, we embark on an analysis of the cases construing them. The pattern of decision which emerges is not crystalline or pellucid, but the cases do lend themselves to rude categorization:

(a) Injuries occurring on piers, wharves, or other extensions of land.

Structures such as wharves, piers, and docks affixed permanently to shore traditionally have been held to be extensions of land and any remedies for injuries occurring on such structures have been held to be restricted to those afforded by local law—this despite the fact that the injured employee was employed by one who was subject to the Lonugshoremen's Act and was injured while loading, unloading, or otherwise concerned with the vessel. *O'Keefe v. Atlantic Stevedoring Company,* 5 Cir. 1965, 354 F.2d 48; *American Export Lines, Inc. v. Revel,* 4 Cir. 1959, 266 F.2d 82; *Nicholson v. Colbeck,* S.D. Tex. 1966, 266 F. Supp. 103; *East v. Oosting,* E.D. Va. 1965, 245 F. Supp. 51; *Johnson v. Traynor,* D. Myld. 1965, 243 F. Supp. 184.

In the *Revel* case, *supra,* Revel, a stevedore, was injured when a load of drums fell onto the pier on which he was working. In denying recovery under the Act, the Fourth Circuit stated clearly that "since Revel was injured while standing on the dock (an extension of land), his remedies are restricted to those afforded by local law." 256 F.2d at 84.

The fact that water ebbs and flows under piers or wharves has been held insufficient to make injuries occurring on them compensable under the Act. *East v. Oosting, supra; Nicholson v. Colbeck, supra.* The con-

trolling question seems to be whether the water beneath the structure has been permanently removed from navigation. As the Court said in *Michigan Mutual Liability Co. v. Arrien*, 2 Cir. 1965, 344 F.2d 640, 644:

> "A wharf or pier is usually built on pilings over what *was* navigable water. When the structure is completed, the water over which it was built is *permanently* removed from navigation as if the structure had been in the first instance built on land."

Thus, in the *Arrien* case, the stevedore injured when knocked from the skid on which he was working was held to be covered by the Act, since the skid in question was a removable platform extending out over the water, was easily dismantled, and was stored on the wharf when not in use. The Court reasoned that the skid was similar to a gangplank as opposed to a permanent structure such as a pier or wharf and that the waters under it were as navigable as they would be if a ship were moored in the same place.

In yet another case, *Johnson v. Traynor, supra*, companion proceedings were brought by two longshoremen injured while loading a vessel afloat on navigable waters from a gondola-type railroad car positioned on railroad tracks at the high pier of the Bethlehem Steel plant. The injuries were caused when a steel beam, being hoisted from the railroad car by a crane located on the vessel, swung back, striking one of the men, propelling him onto the pier, fatally injuring him, and pinning the other to the gondola car. Despite the fact that the pier's 600-foot surface extended over navigable waters, the court denied recovery under the Act. We agree with these interpreta-

tions. If injuries occurring "over" as well as "upon" navigable waters were congressionally intended to be covered by the Longshoremen's Act, the statute could and would have so read. It does not.

(b) Drydocks

Injuries occurring on dry docks, which are located on navigable waters and used to raise the ship out of water to permit examination or repairs to its hull impossible while the ship is afloat, are within Longshoremen's Act coverage by express statutory inclusion. E.g., *Avondale Marine Ways, Inc. v. Henderson,* 1953, 346 U.S. 366, 98 L.ed. 77, 74 S.Ct. 100. In his concurring opinion to the Court's per curiam opinion in *Avondale,* which held that a marine railway is a dry dock within the statute, Mr. Justice Douglas comprehensively defined a dry dock as follows:

> "[T]here are three kinds of dry docks. (1) a floating dry dock, as its name makes clear, floats on the water, the vessel resting on the bottom of the dry dock after the water has been removed. (2) A graven dry dock is dug into the land. The vessel floats in but rests on land once the water has been pumped out. (3) Finally there is the marine railway, on which the vessel is drawn out of the water, instead of the water being drawn away from the vessel. A ship is no more and no less on land when it rests in a graven dry dock than when it rests on a marine railway. The three types of dry docks are not different in kind: functionally they are the same. And I see no basis for concluding that Congress treated one differently from the others for the

purposes of this Act." 346 U.S. at 367, 98 L.ed. at 79, 74 S.Ct. at ____.

See also *O'Leary v. Puget Sound Bridge and Dry Dock Co.*, 9 Cir. 1965, 349 F.2d 571, 572-73.

Land alongside and under a marine railway has also been held to be an integral part of the marine railway and hence a dry dock. *Holland v. Harrison Brothers Dry Dock and Repair Yard, Inc.*, 5 Cir. 1962, 306 F.2d 369. Confronted with a shipyard workman who was injured while lifting hose to work on a barge drawn up on a marine railway, Judge Wisdom, speaking for the Court, said:

> "It seems reasonable to us that any meaningful definition of marine railway should include the land immediately adjacent to the track *that is beneath a ship drawn up on the railway and that must be used in the course of repairing any ship on the railway.*" 306 F.2d at 372.

In the recent case of *O'Leary v. Puget Sound Bridge and Dry Dock Co., supra,* the Ninth Circuit faced the dry dock inclusion in the Longshoremen's Act and indicated its unwilllingness to further enlarge longshore coverage. That case involved an injury sustained on dry land by an employee engaged in new ship construction from a building way. The building way, located on land, had its seaward end extending into the water on an incline, around which water flowed. In holding that the building way did not constitute "any dry dock" within the Act, despite the portion which extended into the water, the Court affirmatively imposed a limit to the outer boundaries of the Longshoremen's Act.

(c) Injuries occurring in or upon navigable waters: Cases with exceptional fact situations

Finally, there are those exceptional cases which base their holdings allowing recovery upon unique factual situations. Most representative is *Interlake Steamship Company v. Nielson*, 6 Cir. 1964, 338 F.2d 879, cert. den. 381 U.S. 934, where the Court permitted recovery under the Act for a fatal injury occurring when a shipkeeper drove his automobile off a dock and fractured his skull on the frozen navigable waters of Lake Erie. The Court reasoned that despite the fact that the impetus which propelled claimant onto the ice had a land-based origin, the situs of the injury and death was clearly the frozen navigable water of Lake Erie, undisputedly within the scope of admiralty jurisdiction. Similarly, recovery has been allowed where a longshoreman was lifted from the dock, dropped into navigable water between the ship and the wharf, and drowned, *O'Keefe, supra,* and where drowning resulted from a fall off the pier, *Marine Stevedoring Corp., supra.* These cases support the thesis that the Longshoremen's Act should be applicable in these and similar factual situations, for, as said in 2 Am. Jur. (2d), Admiralty, §85:

> "If a person or property is precipitated from land into the sea as the result of a wrongful act or omission, and there is no impact on the person or property before he or it strikes the water, the tort, for jurisdictional purposes, is considered to have occurred on the water. . . ."

Applying existing case law to the outfitting pier in question, the conclusion is inescapable that this was a ter-

ritorial tort rather than a maritime misfeasance within the construction of the Longshoremen's Act. The law in this area has been geographized as the "twilight zone", and though our only illumination is by twilight, our direction is clear. This pier does not dwell in a penumbra, for the plethora of cases safely navigates us, by buoys and soundings, to land; that is, to the law governing injuries occurring on piers, wharves, or similar structures. We have no unique or exceptional factual situation before us.

The court below found that McCollough was injured when "working on a floating outfitting pier supported by barges. The pier was some 900 feet long and was permanently anchored to the shore and bottom of the Sabine River by piling clusters." It had, moreover, been so anchored for eighteen years. This outfitting pier, in sum, was a structure permanently affixed as an extension of land. It was not akin to the skid in *Arrien, supra,* for it was the very antithesis of a transient or transitory structure. Its permanent home was in the water, and the waters below it had been completely removed from navigation. As such, it must be considered a pier or wharf, and injuries occurring upon it, like the one suffered by McCollough, are compensable only by local law and are not covered by the Longshoremen's Act. *O'Keefe, supra; Revel, supra; Nicholson, supra; East, supra; Johnson, supra.* No conclusion contra is indicated by the *Interlake Steamship Co.* line of cases, discussed *supra,* since these cases are readily distinguishable on their facts from the one at bar.

Appellees would have us liken this floating outfitting pier to a dry dock or to the land alongside a marine railway, since the pier can be used to repair a ship. Thus, they urge that we uphold the Deputy Com-

missioner's award. We have not, however, dealing with a dry dock or marine railway. A dry dock fuctionally as well as nautically is different from a floating barge. A dry dock lifts or shifts the ship. If it is to be a marine railway, it is hoisted upon land. If it is to be a dry dock. it submerges or fills with water. This floating barge does neither, and it must be remembered that the coverage of the Longshoremen's Act is not keyed to function but is situs-oriented. We are not impressed by the fact that McCollough was injured when assisting in repairing a vessel. We are, however, very impressed by the undisputed evidence, which shows that the situs of the injury to McCollough was a permanently anchored structure which, once built, was an extension of the shore of the Sabine River.

The Deputy Commissioner and appellee McCollough would, by some absorptive process, engraft the provisions of the Admiralty Extension Act of 1948, 46 USCA §740,[2] onto the Longshoremen's Act. This may have some logical magnetism, but it defies the precursive and the posterior history of both Acts. In *Johnson v. Traynor, supra,* a similar claim was made that the Admiralty Extension Act in effect amended the coverage provision of the Longshoremen's Act and extended coverage under the latter act to certain types of land injuries. In an extensive, scholarly opinion, Judge Watkins dismissed this contention, saying that Congress, although it had been urged to, did not intend to so extend coverage.

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[2] 46 USCA §740 provides in pertinent part:
"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

"Certainly the Extension Act does not strike down the distinction previously made by the courts between land injuries and water injuries. Indeed the act expressly recognizes the existence of land injuries as distinguished from injuries occuring on navigable water. . . .

"Secondly, the Extension Act is certainly not an express amendment of the Longshoremen's Act. It is completely silent as to the Longshoremen's Act. Similarly a contemporaneous amendment of the Longshoremen's Act contains no cross reference to the Extension Act. . . .

"Thus, there is no indication in any of the legislative history pertaining to the Longshoremen's Act either before, at the time of, or after the passage of the Extension Act that the Extension Act was intended in any way to affect the scope of coverage of the Longshoremen's Act."

243 F.Supp. at 190-92.

If the Admiralty Extension Act were to measure the jurisdictional perimeter of the Longshoremen's Act, this could have and would have received express Congressional articulation. The reports, debates, colloquies, and other prologues to legislative gestation, as well as the recent judicial decisions, do not indicate any such doctrine of co-extensiveness. *Interlake Steamship Co., supra; East, supra.*

Reversed and remanded for proceedings consistent with this opinion.

JUDGMENT

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23,492

D. C. Docket No. CA 5055

THE TRAVELERS INSURANCE COMPANY and LEVINGSTON SHIPBUILDING COMPANY,

Appellant,

versus

R. J. SHEA, Deputy Commissioner, and JAMES D. McCOLLOUGH,

Appellees.

Appeal from the United States District Court for the Eastern District of Texas

---

Before GEWIN, COLEMAN and GOLDBERG, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and the same is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court.

August 9, 1967

Issued as Mandate: Sep. 1, 1967

JUDGMENT.

Filed Dec. 10, 1965.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TEXAS,
BEAUMONT DIVISION

TRAVELERS INSURANCE COMPANY AND
LEVINGSTON SHIPBUILDING COMPANY

v. Civil No. 5055.

R. J. SHEA, DEPUTY COMMISSIONER, AND
JAMES D. McCOLLOUGH

On this day came on to be considered the above styled and numbered cause filed pursuant to Article 33, U.S.C.A., 921 (a) and (b), wherein Plaintiff seeks to set aside an award of the Deputy Commissioner filed on August 13, 1965.

The Plaintiff has filed a Motion for Summary Judgment and the Defendant has filed a Motion to Dismiss. Both parties have filed briefs in support of their respective positions.

This Court has reviewed the pleadings, transcript of the record; motions and briefs filed by the respective parties and is of the opinion and finds that the defenddants are entitled to judgment affirming the compensation order and dismissing the complaint as a matter of law, because there is no genuine issue as to any material fact in that the compensation order appealed from by the complaint of the plaintiffs herein is supported by substan-

tial evidence in the record before the Deputy Commissioner and in accordance with law.

It is therefore Ordered, Adjudged and Decreed by the Court that Plaintiffs Motion for Summary Judgment is overruled; that Defendants Motion to Dismiss be granted and the compensation order of the Deputy Commissioner filed on the 13th day of August, 1965, be and the same is hereby affirmed.

Entered this 10th day of December, 1965.

JOE J. FISHER,
United States District Judge.

MEMORANDUM.

Filed Dec. 10, 1965.

IN THE
DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF TEXAS,
BEAUMONT DIVISION

TRAVELERS INSURANCE COMPANY AND
LEVINGSTON SHIPBUILDING COMPANY,

v. Civil Action No. 5055.

R. J. SHEA, DEPUTY COMMISSIONER, AND
JAMES D. McCOLLOUGH

These are cross-motions for judgment in an appeal proceeding from an award of compensation benefits under the Longshoremen's Act, 33 U.S.C. 901 et seq. The motion of the defendant deputy commissioner to dismiss the action is granted; the motion of the plaintiffs' compensation insurer and employer to set aside the award as contrary to law is denied.

The deputy commissioner found as a fact that the claimant was injured upon navigable waters while assisting in repairing a barge when feeding a sand blasting machine. This is fully supported by substantial evidence in the record considered as a whole. The evidence shows the

claimant was working on a floating outfitting pier supported on barges. The pier was some 900 feet long and was permanently anchored to the shore and bottom of the Sabine River by piling clusters. Claimant was promptly paid compensation at the scale provided by Texas law, but brought his claim for the additional amount due under the federal Act. The deputy commissioner allowed full credit for all payments as provided by 33 U.S.C. 914(k).

Literally, "navigable waters" must include all necessary working places alongside vessels undergoing repairs. This includes places such as the floating pier, supported on barges, here involved, which extends from the land over and upon the water alongside the vessels and which are used as the work goes on back and forth between the pier and the vessel being repaired. The situation of shipyard employees working on a floating pier alongside a vessel afloat is no different from that of the same employees while working on dry land alongside a vessel on a marine railway. Of the later our Court of Appeals has said in Holland v. Harrison Bros., 306 F.2d 369, 372 (5th Cir. 1962), "any meaningful definition of marine railway should include the land immediately adjacent," and earlier in Maryland Casualty Co. v. Lawson, 101 F.2d 732, 733 (5th Cir. 1939), it said such adjacent land was included because "the land was part of the yard necessary to the operation of the marine railway." Cf. Dixon v. Oosting, 238 F. Supp. 25, 29 (E.D. Va. 1965); United States v. Yee Nee How, 105 F. Supp. 517, 521-522 (N.D. Calif. 1952).

After Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962), mere availability of a validly provided state

compensation remedy does not any longer require denial of a Longshoremen's Act award for an injury to a shipyard worker while working in any place included within the meaning of "navigable waters" contrary to what was formerly the case. See New Amsterdam Casualty Co. v. McManigal, 87 F.2d 332, 333-334 (2d Cir. 1937).

Entered this 10th day of December, 1965.

JOE J. FISHER,
United States District Judge.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 788

JAMES D. McCOLLOUGH,

Petitioner,

v.

THE TRAVELERS INSURANCE COMPANY and
LEVINGSTON SHIPBUILDING COMPANY,

Respondents.

AMICUS CURIAE PETITION AND BRIEF IN FAVOR OF PETITIONER

American Trial Lawyers Association
Admiralty Section
By: Paul S. Edelman

PAUL S. EDELMAN,
99 Park Avenue,
New York, New York.
On Petition and Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

JAMES D. McCOLLOUGH,

Petitioner,

v.

THE TRAVELERS INSURANCE COMPANY and
LEVINGSTON SHIPBUILDING COMPANY,

Respondents.

AMICUS CURIAE PETITION AND BRIEF IN FAVOR OF PETITIONER

American Trial Lawyers Association
Admiralty Section

Statement of Interest of the *Amicus Curiae*

Paul S. Edelman, of Kreindler & Kreindler, New York, New York, a member of the bar in this Court, on behalf of the American Trial Lawyers Association, respectfully petitions this Court for leave to file a brief *Amicus Curiae* on behalf of petitioner herein, and if granted, for this Honorable Court to consider the arguments and cases in point following this Statement of Interest.

Consent to the filing of this brief has been given by the attorneys for the Respondents and also by Hon. Erwin N. Griswold, Solicitor General, on behalf of the United States Department of Justice, representing R. J. Shea, Deputy Commissioner.

The American Trial Lawyers Association, is a national bar association, consisting of more than 20,000 lawyers, primarily engaged in the practice of personal injury law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors who specialize in maritime personal injury law. These attorneys represent members of the merchant marine and other maritime workers who are engaged in a hazardous industry and are recognized as having a special status both by legislation and generally in the courts of the land. All of these maritime workers have a real and direct interest in the outcome of this appeal.

Said association is vitally concerned in the final outcome of this case involving as it does a situation which may finally resolve the tortuous series of cases which have attempted for over a generation to make a clear line by which attorneys and injured maritime workers will know their rights. It is a question of serious importance since 25% of all maritime workers' injuries occur on docks and piers, and in most states the average compensation is but half the federal rate.

A resolution of the issues in this case will materially affect not only the financial plight of injured maritime workers, but is of paramount importance to hundreds of thousands of workers, to the admiralty bar, and to the maritime industry generally. For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief *Amicus Curiae*.

PAUL S. EDELMAN,
of KREINDLER & KREINDLER,
99 Park Avenue,
New York, New York 10016.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

JAMES D. MCCOLLOUGH,

Petitioner,

v.

THE TRAVELERS INSURANCE COMPANY

and

LEVINGSTON SHIPBUILDING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN TRIAL LAWYERS ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

On behalf of James D. McCollough, the American Trial Lawyers Association prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered August 9, 1967.

Questions Presented

The employee was injured while on a working barge permanently anchored on a navigable river, the barge rising and falling with the flow of the river. The barge was one of several adjacent to a floating drydock. The deputy commissioner awarded compensation to the employee, petitioner herein. Was the award within the coverage of the Longshoremen's Act as "occurring upon the navigable waters of the United States" particularly within the presumption of coverage granted by the Longshoremen's Act?

Statement

The employee suffered injury while in maritime employment on a floating steel barge, one of four which constituted an outfitting pier. The barges were fixed in place, but rose and fell with the movement of the Sabine River, a major and navigable waterway.

An award was made by the deputy commissioner and affirmed in the district court. On appeal to the Court of Appeals for the Fifth Circuit, the award was reversed on the basis that the structure on which the employee was injured was essentially an extension of land although the opinion conceded the situs to be a "floating barge" (p. 11).

Besides the particular fact situation of this case which involved a floating barge, your petitioner seeks to have this Court settle a more important and general question of maritime law, namely whether the Longshoremen's Act is co-extensive with federal maritime jurisdiction and whether work barges and other maritime structures concededly above or on navigable waters are within the coverage of the Longshoremen's Act. Will man-made structures above or on such waters withdraw these waters from the federal interest?

Nearly one-quarter of all injuries of maritime workers occur on man-made structures on or over maritime waters adjacent to ships being either loaded, unloaded or as in this case, repaired. Awards available under the federal act are typically twice the awards available under state acts, as in this case, and the decision below is narrow not only in its holding of coverage for the Longshoremen's Act, but is narrow in its philosophy of federal interest in a just compensation remedy.

In addition, this Court is being asked to answer the question whether the Longshoremen's Act jurisdiction is co-extensive with maritime contracts which concern maritime workers directly involved in ship repair work at a floating dry dock.

POINT I

The employee was injured on a floating work barge which rose and fell and was thus "upon the navigable waters of the United States" under Section 903(a) of the Longshoremen's Act.

The Circuit Court below held that the work barge on which Mr. McCollough was injured was an extension of land, and denied recovery. But this contention is answered by the observations that the waters below every barge or vessel would then logically be withdrawn from navigation. The absurd result would be that every maritime worker on any anchored barge would be denied the application of the Act even though as in the case at bar the waters were tidal and went up and down with the barge.

Claimant was injured on a barge in the water adjacent to and necessary to the working of a floating drydock. Both outfitting barge and drydock rose and fell with the water, and access to the drydock was over the outfitting barge. In the very activity in which claimant suffered his injury, access to the vessel being sandblasted required the

working together of equipment over the outfitting barge to the drydock area.

Maritime workers injured on a "drydock" are specifically covered by the Longshoremen's Act as well as those who work at least in part upon navigable waters.

33 U.S.C., Sec. 902(4); 903(a).

A "drydock" included a marine railway whereby a vessel is drawn from the water onto land.

Avondale Marine Ways, Inc. v. *Henderson* (1953), 346 U. S. 366.

To make this meaningful, the land adjacent to a marine railway is within the geographical and functional scope of the Longshoremen's Act. This has been the consistent view of the Courts of Appeals.

Holland v. *Harrison Bros. Drydock etc.* (5th Cir. 1962), 306 F. 2d 369, 372, and *Maryland Casualty Co.* v. *Lawson* (5th Cir. 1939), 101 F. 2d 732, 733, cited with approval in the *Avondale Marine Ways* case.

A "building way" injury has also been held covered by the Longshoremen's Act. A building way is on land and used for new ship construction, but the outermost end extends into the water for the launching of a completed vessel. The "building way" was held to be sufficiently within the term "dry dock" to allow recovery for a workman under the Longshoremen's Act in *Port Houston Ironworks Inc.* v. *Calbeck* (S. D. Tex., 1964), 227 F. Supp. 966.

The District Court below rightfully made this point in its decision for the claimant.

The record indicates that claimant was upon a work barge next to a floating dry dock and was involved in an operation for the sandblasting of an oil barge tied up on the "other side of Dry Dock No. 1". Claimant was feed-

ing the sandblasting machine on the work barge, at the time of this injury. The work barge was functionally involved with the oil barge repair work at the dry dock and the work barge was connected to the dry dock. At the time of the accident, work at the dry dock area required that there be direct access across the floating outfitting barge.

Compensation acts in general, and the Longshoremen's Act in particular are to be liberally construed in favor of coverage.

Many decisions involving the Longshoremen's Act discuss this principle of statutory construction. *Reed* v. *The Yaka* (1963), 373 U. S. 410, restates this proposition:

> "'We have previously said that the Longshoremen's Act must be liberally construed in the conformance with its purpose, and in a way which avoids harsh and incongruous results."

Accord:

Voris v. *Eikel* (1953), 346 U. S. 328.

In addition, we have the long and still vital history of the "Twilight Zone" cases before us. Ever since 1942 in *Davis* v. *Department of Labor and Industries,* 317 U. S. 249, the Supreme Court has held that wherever there is doubt in applying state as opposed to federal compensation acts in maritime situations, the *tribunal chosen by the claimant* has a presumption of valid jurisdiction. *Davis* states:

> ". . . the line separating the scope of the two being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side."

Davis has been interpreted as ". . . a revolutionary decision deemed necessary to escape an intolerable situation

and as designated to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way . . ."

Moores' case Supp. Mass. (1948), 323 Mass. 162, 167, 80 N. E. 2d 478, 480 (aff'd (1948) 335 U. S. 874, *sub nom-Bethlehem Steel Co.* v. *Moores.*

The *Calbeck* case (1962), 370 U. S. 114, still makes clear that in any doubtful area the claimant may elect his remedy, and that the Twilight Zone rule still holds.

Respondents would undo all the practical solutions brought forward by the *Davis* case, and applied since 1942.

POINT II

The employee was injured adjacent to a drydock and vessel while serving the vessel and was injured within the scope of admiralty jurisdiction and thus within the reach of the Longshoremen's Act.

The Supreme Court has made it clear on various occasions when the issue was before it, that in passing the Longshoremen's Act, "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter", and that, ". . . Congress intended the compensation act to have a coverage co-extensive with the limits of its authority".

This holding is clearly stated in *Calbeck* v. *Travelers Ins. Co.*, 370 U. S. 114 (1962), which dealt with the application of the federal act to a welder engaged in "new" ship construction, as opposed to the suggested exclusive remedy of state compensation. The Court cited extensively the language quoted from *DeBardeleben Coal Corp.* v. *Henderson* (5th Cir. 1944), 142 F. 2d 481, at page 130 of 370 U. S.

Once accepting this clear proposition, it is only necessary to establish how far "ashore" the admiralty jurisdiction extends.

By statute, the Admiralty Extension Act, 46 U.S.C., Sec. 740 (1948), provides:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land."

The meaning of "caused by a vessel on navigable waters" has authoritatively been held to mean that even a dockside injury is covered by maritime law where the injury arose out of some "service to the ship".

The Supreme Court so held in *Gutierrez* v. *Waterman Steamship Co.*, 373 U. S. 206 (1963), and rejected the contention that the injury must be caused by the vessel or ship's appurtenances. In *Gutierrez*, a longshoreman was injured on a wharf when he slipped on beans that had spilled out of bags being unloaded from the vessel, and the Court held that this dockside accident was within the maritime jurisdiction and subject to the doctrine of unseaworthiness.

Justice White, speaking for the Court made it clear that the impact on dockside was within the ambit of maritime jurisdiction because of the Extension of Admiralty Jurisdiction Act, and stated:

> "Respondent contends that it is not liable at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C., Sec. 740, swept it away. * * *"

From *DeBardeleben* to *Gutierrez*, it is demonstrated that the Longshoremen's Act is co-extensive with admiralty jurisdiction, and that admiralty jurisdiction extends even to dockside where a worker is injured because of an activity related to a vessel although not caused by direct contact with a vessel or its appurtenances.

The wide application of the rule that the Longshoremen's Act is co-extensive with federal maritime jurisdiction is underlined by *Boston Metals Co.* v. *O'Hearne*, D. C. Md. Adm. #4412, unreported opinion, June 20, 1963, aff'd (4th Cir. 1964) 329 F. 2d 504. In that case a widow of a welder who was killed on a decommissioned hulk was held entitled to collect under the Act. The hulk was fast aground and in the process of being scrapped. District Judge Winter in the unreported opinion to this case stated:

> "I think the *Calbeck* case equates, I think the legislative history (of the Longshoremen's Act) supports, and I think the decisions in this Circuit also support the concept that *navigable waters* of the United States *means the admiralty jurisdiction of the United States, whenever it may be from time to time.*
>
> * * * I think that the *Calbeck* case makes perfectly plain that the application of the Longshoremen's and Harbor Workers' *Act* was *not* to be *frozen* to the *admiralty jurisdiction* of the United States as it then existed *in 1927* or as it was *considered then* to *exist*, but that rather there may be read into the Longshoremen's and Harbor Workers' Act a more flexible concept that under *subsequent legislation or*, as a result of *subsequent court decisions*, the admiralty jurisdiction of the United States is being expanded and the application of the *Longshoremen's* and Harbor Workers' *Act expands along with it.*"

In *Holland* v. *Harrison Bros. Drydock, etc.* (5th Cir. 1962), 306 F. 2d 369, 373, footnote 4 states that not only the locality is important but also "the nature of the work".

The footnote further states:

> "* * * The literal language of the Longshoremen's Act seems to concern only the locality of the accident, but the history of the Act indicates that its *underlying purpose* was to *embrace the admiralty jurisdiction whatever that might be.*" (Emphasis added.)

The reasoning above has allowed recovery for seamen ashore when injured in the service of the ship under the Jones Act.

In *O'Connell* v. *Great Lakes Dredge and Dock Co.* (1943), 318 U. S. 36, a seaman was injured on land during the repair on a gasket connection to a land pipe used in discharging a ship's cargo.

A handyman who assisted in navigation of a dredge was injured in a shed on shore due to an explosion in a coal stove while he was placing lamps from the dredge in the shed. Recovery was sanctioned under the Jones Act in *Senko* v. *LaCrosse Dredging Corp.* (1927), 352 U. S. 370.

The most far-reaching case is, of course, *Hopson* v. *Texaco, Inc.* (1966), 15 L. Ed. 2d 740. In that case two ill seamen in a foreign port were being taken to the United States consul in a taxi cab procured by the ship's master. The cab driver was in a collision, through his negligence. One seaman was killed and one was injured. The taxi service was held to be an "agent" of the shipowner, and recoveries were allowed against the shipowner under the Jones Act.

The same grant of power to Congress by the Constitution delimits the reach of the Jones Act and the Longshoremen's Act. Where an injury occurs because of a vessel-connected activity the scope of both these federal statutes extends and grants a remedy.

The fact that the barge in question is denoted a "pier" or "wharf" by respondents should not affect the result.

"A wharf is a structure on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded. Hence waters of sufficient depth to float vessels is an essential part of every wharf. *A wharf cannot be defined or conceived except in connection with adjacent navigable waters.*" (Emphasis supplied.)

Langdon v. *City of New York* (1883), 93 N. Y. 129, 151.

POINT III

The Longshoremen's Act applies to maritime contracts of employment on man-made structures on or above navigable waters.

Admirably jurisdiction extends to all damage or injury occurring during the performance of a maritime contract, including contracts of ship repair and whether the injury involves piers and wharves over navigable waters, or involving man-made structures such as a work barge upon navigable waters.

As indicated in Point II, it is the contractual maritime jurisdiction which allows Jones Act recovery for crew members injured ashore through the negligence of their employer or agents of the employer.

The Longshoremen's Act is based on the New York Workmen's Compensation Act. Because the New York Act regulates the employment contract, it even applied to employees injured in other states so long as New York has an interest in the employment contract.

Baduski v. *S. Gumpert Co., Inc.*, 277 App. Div. 591, 102 N.Y.S. 2d 297, App. dism. 302 N. Y. 702.

Cases in Point I demonstrate the applicability of land-based injuries in conjunction with repair work on dry-docks. These cases make the situation in the case at bar

applicable since even if the floating barge was an appurtenance to land, the injury occurred while a ship was at a drydock.

But the dry dock cases also demonstrate that injuries on a pier or wharf are within the ambit of the Longshoremen's Act, because a pier or wharf is on or over navigable water.

A federal interest in navigable waters is not withdrawn by placing man-made structures on or over such waters.

United States v. *Appalachian Power Co.* (1940), 311 U. S. 377, 408, 409.

Economy L. & P. Co. v. *United States* (1921), 256 U. S. 113, 118, 124.

Impact on a dock or pier has been the basis for recovery under the federal Longshoremen's Act where the employee was thereafter propelled into the water.

Interlake S.S. Co. v. *Nielsen* (6th Cir. 1964), 338 F. 2d 879, cert. den. 381 U. S. 934.

Michigan Mutual Liability Co. v. *Arrien* (2d Cir. 1965), 344 F. 2d 640, cert. den. 382 U. S. 835 (injury on a "stage" of skids extending over the water).

The mere fact that the injured party subsequently went into the water should not be decisive of coverage of the Act where the initial injury was on the dock or pier; if the injury was in maritime employment when it occurred on the pier in these cases it should also be applicable to the case at bar.

If on the other hand an artificial distinction is made between what is "on" and what is "over" navigable water then airplane accidents would be excluded from coverage by the Death On The High Seas Act. But in all logic, such deaths including explosions in airplanes in flight and the like are covered by the Death On the High Seas Act.

D'Aleman v. *Pan American World Airways* (2d Cir. 1958), 259 F. 2d 493.

This Court has never definitively decided that an injury on a man-made structure adjacent to ship repair activity is precluded from recovery under the federal Act. It is respectfully submitted that the legislative history of the Act sought this application; it is consistent with the jurisdiction of the Congress over such activities, and the Act presumes coverage of the Act in a borderline activity (Sec. 920).

The legislative history of the Act in 1926 and 1927 indicated that maritime coverage was the purpose of the Act, and that the Act was to be applied as far ashore as the maritime activity itself extended. If navigable waters are involved in a broad, common-sense definition, the employee has an election to come under the federal Act.

Calbeck v. *Travelers Inc. Co.* (1962), 370 U. S. 114. *Holland* v. *Harrison Bros. Dry Dock, etc.* (5th Cir. 1962), 306 F. 2d 369, 372, 373.

From the very beginning of the controversy over federal and state jurisdiction in *Southern Pacific Co.* v. *Jensen* (1917), 244 U. S. 205, 217, it was made clear that a maritime worker whose "employment was a maritime contract" and who received maritime-connected injuries was within the federal concern. See also *Atlantic Transport Co.* v. *Imbrovek* (1914), 234 U. S. 52, 62.

Respectfully submitted,

AMERICAN TRIAL LAWYERS ASSOCIATION,

By Paul S. Edelman,
Attorney for *Amicus Curiae.*

Dated at New York, New York, this 27th day of November, 1967.

Certificate.

This is to certify that on the 27th day of November, 1967, copies of the above application to appear as *Amicus Curiae* and brief in support thereof have been forwarded to Hon. Erwin N. Griswold, Solicitor General, United States Department of Justice, Washington, D. C. 20530, Attorneys for R. J. Shea, Deputy Commissioner, to the Honorable Louis V. Nelson, Attorney for Respondents, The Travelers Insurance Company and Levingston Shipbuilding Company, P. O. Box 1632, Beaumont, Texas; and to the Honorable Ward Stephenson of Stephenson, Thompson and Morris, at the Stephenson Building, Orange, Texas, Attorney for Petitioner, James D. McCollough.

.....

PAUL S. EDELMAN

SUPREME COURT, U. S.

DEC 6 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

NO. 788

JAMES D. McCOLLOUGH, *Petitioner*

v.

THE TRAVELERS INSURANCE COMPANY

AND

LEVINGSTON SHIPBUILDING COMPANY,

Respondents

BRIEF OF RESPONDENTS OPPOSING THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1967

NO. 788

JAMES D. McCOLLOUGH, *Petitioner*

v.

THE TRAVELERS INSURANCE COMPANY

AND

LEVINGSTON SHIPBUILDING COMPANY,

Respondents

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

Respondents, The Travelers Insurance Company, and the Levingston Shipbuilding Company, oppose the Petition for a Writ of Certiorari to review the judgment in United States Court of Appeals for the Fifth Circuit entered on August 9, 1967, in the case of The Travelers Insurance Company and Levingston Shipbuilding Company v. R. J. Shea, Deputy Commissioner, and James D. McCollough.

QUESTION PRESENTED

Whether or not, under the facts and circumstances of this case, the accidental injury to James D. McCollough, while working on a stationary outfitting pier, permanently affixed to land, comes within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act instead of the Workmen's Compensation Act of the State of Texas.

STATEMENT OF THE CASE

Petitioner, James D. McCollough, was injured as an employee of the Levingston Shipbuilding Company on March 20, 1965, while picking up a sack of sand on Station No. 3 of a stationary, permanently affixed, floating outfitting pier. This pier consisted of floating steel barges tied end to end, approximately 750 feet long in total length. These barges are connected to land with a floating barge 90 feet long and a ramp which is 45 feet by 90 feet. This floating outfitting pier is stationary at both ends and anchored with clusters of pilings, has not been moved in approximately eighteen years, and is permanently affixed to land.

At the time of the accident made the basis of the claim in this suit, the employee, James D. McCollough, and the employer, Levingston Shipbuilding Company, were covered by the Texas Workmen's Compensation Act, and the employer was a subscriber under the terms of said Act. James D. McCollough filed a claim for workmen's compensation benefits with the Industrial Accident Board of the State of Texas and was paid benefits under the terms and provisions of the Texas Workmen's Compensation Act.

The Deputy Commissioner rendered an award on August 13, 1965, by which he awarded disability benefits and medical expenses to Petitioner, James D. McCollough. The Respondents filed suit to enjoin the enforcement of the award under the Longshoremen's and Harbor Workers' Compensation Act in the United States District Court for the Eastern District of Texas, Beaumont Division. From a judgment denying The Travelers Insurance Company's and Levingston Shipbuilding Company's request for a mandatory injunction setting aside the award of the Deputy Commissioner and granting a motion to dismiss on behalf of Deputy Commissioner, the Plaintiffs, The Travelers Insurance Company and Levingston Shipbuilding Company, perfected an appeal to United States Court of Appeals for the Fifth Circuit.

The United States Court of Appeals for the Fifth Circuit rendered an opinion on August 9, 1967, which reversed the decision of the District Court for the Eastern District of Texas and held that the petitioner's remedy was exclusively within the scope of State compensation coverage.

REASONS FOR REFUSING THE WRIT

(1) The Admiralty Extension Act of 1948 did not amend the Longshoremen's and Harbor Workers' Act, to include injuries occurring on docks, piers or wharves and "being engaged in maritime employment" is not controlling where the situs of the injury is a dock, wharf, pier or extension of land.

The petitioners argue that the Admiralty Extension Act of 1948 extended the coverage of Longshoremen's and

Harbor Workers' Act to include injuries occurring on docks, wharves, piers or extensions of land. The claimants would have this court equate the jurisdictional requirement of the Longshoremen's Act of the occurrence of the injury "upon navigable waters" with occurrence of the injury within the "admiralty jurisdiction" of the United States as that jurisdiction is spelled out in the Extension of Admiralty Jurisdiction Act. Neither the language or the history of the Act supports that position, but to the contrary, shows that Congress was aware of and accepted the rule of exclusive State Compensation coverage.

Both the text of the Extension Act and the Committee reports disclose no congressional intent to change the coverage of the Longshoremen's and Harbor Worker's Act. The language of the Extension Act makes it plain that Congress was not re-defining "navigable waters", but was simply extending the admiralty jurisdiction in tort cases only.

It is significant that in enacting the Longshoremen's Act, Congress specifically chose the phrase "navigable waters" in preference to the phrase "admiralty jurisdiction." As originally introduced, the Longshoremen's Act contained a provision covering "any employment performed on a place within the admiralty jurisdiction of the United States except in employment of local concern and of no direct relation to navigation and commerce." (Hearings on S. 3170, Senate Judiciary Committee, 69th Cong. 1st Sess., Page 2;) After much discussion, the phrase "navigable waters" was substituted in preference to "admiralty jurisdiction." Had Congress considered the two phrases identical, there would have been no need for the substitution of one for the other.

Section 740 of the Extension Act provides:

> The admiralty and maritime jurisdiction of the United States shall extend to include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

The narrow purpose of that Act is disclosed by its second paragraph, which provides:

> "In any such case, suit may be brought in rem or in personam."

Thus, the Extension Act pertains only to judicial remedies and does not affect compensation remedies. A proceeding before the Deputy Commissioner under the Longshoremen's Act is not a suit in rem or in personam. It is an administrative proceeding to obtain compensation without regard to tortious conduct commenced with the filing of a claim with an administrative officer, and terminated with an administrative order. The Extension Act did not attempt to, nor intend to, create new causes of action, *Johnson v. Traynor*, 243 F. Supp. 184 (D. Md. 1965).

The Extension Act is not an express amendment of the Longshoremen's Act. It is completely silent as to the Longshoremen's Act. Similarly, a 1948 amendment of the Longshoremen's Act contains no cross-reference to the Extension Act or to any possible passage of the co-pending Extension Act. (1948 U. S. Code Cong. Serv., Vol. 2, pp. 1979-1984.)

The Bureau of Employees Compensation of the United States Department of Labor which has been charged with administering the Longshoremen's Act since it was passed,

has consistently construed it as not applying to injuries occurring upon a dock, wharf, or pier. In this regard, it is significant to note that the Department of Labor was a party to the instant suit before the United States Court of Appeals for the Fifth Circuit, but has not chosen to perfect an appeal to this Court and apparently is satisfied with the Court's determination of the facts and the law as applied to the instant case.

Similarly, the Courts have rejected the suggestion of expanded coverage. In *American Export Lines v. Revel,* 266 F.2d 82 (4th Cir. 1959) a state compensation award had been accepted for longshoremen's pierside injury. The claimant thereafter brought suit against the shipowner, who defended on the grounds that the claimant had received payments under State compensation acts by reason of which they were statutory employees of the shipowners. The Court expressly held:

> "Since Revel was injured while standing on the dock (an extension of the land), his remedies are restricted to those afforded by local law . . . *This is true even though Congress has embraced such cases within the maritime jurisdiction of the United States.* Extension of Admiralty Act, 46 USCA sec. 640" *Revel,* supra 266
>
> See also *Atlantic Stevedoring Co. v. O'Keefe,* 220 F. Supp. 881 (S.D. Ga. 1963) reversed on other grounds, 354 F.2d 48 (5th Cir. 1965); *Johnson v. Traynor,* 243 F. Supp. 184 (D. Md. 1965); *Hastings v. Mann,* 340 F.2d 910 (4th Cir. 1965) cert. den. 85 S.Ct. 1106, 380 U.S. 963, 14 L.Ed.2d 153.

The Court below correctly assessed the relationship between the Admiralty Extension Act and the Longshoremen's Act.

> "If the Admiralty Extension Act were to measure the jurisdictional perimeter of the Longshoremen's Act, this could have and would have received express Congressional articulation. The reports, debates, colloquies, and other prologues to legislative gestation, as well as the recent judicial decisions, do not indicate any such doctrine of co-extensiveness. *Interlake Steamship Co.*, supra; *East*, supra; *Travelers Insurance Co., et al v. Shea, et al.* ____F.2d____ (5th Cir. 1957) p. 13 — opinion.

Petitioners are also in error in contending that *Calbeck v. Travelers* (1962) 370 U.S. 214, 82 S.Ct. 1196, has changed the law applicable to injuries occurring upon a dock, wharf, pier or extension of land. All *Calbeck* holds is that when an injury occurs upon navigable waters, within the traditional admiralty tort jurisdiction, the fact that the state law might validly apply under the "local concern" doctrine does not exclude the application of the Longshoremen's Act. Since the injuries there concededly occurred upon navigable waters within the traditional admiralty tort jurisdiction, there was no occasion for this Court to rule upon the scope of the statutory phrase "upon the navigable waters of the United States." The Court did, however, quote the Congressional reports showing that Congress did not intend the Act to apply to pierside injuries which were beyond the traditional admiralty tort jurisdiction, and stated that the federal Act's coverage extends "to the limits of navigable waters", 370 U.S. at 123, 125-126. There is no suggestion that this Court was construing the phrase "navigable waters" in any way other than as it had done in *Swanson v. Marra Bros.* (1946), 66 S.Ct. 869, 328 U.S. 1, 90 L.Ed. 1045.

The petitioner's reliance on *Gutierrez v. Waterman Steamship Corp.* (1963) 373 U.S. 206, 83 S.Ct. 1185,

10 L.Ed.2d 297 and other cases of unseaworthiness liability for land injuries, is misplaced. The Court below placed the instant case in the proper perspective:

> It must be remembered that the coverage of the Longshoremen's act is not keyed to the function but is situs-oriented. We are not impressed by the fact that McCollough was injured when assisting in repairing a vessel. We are, however, very impressed by the undisputed evidence, which shows that the situs of the injury to McCollough was a permanently anchored structure which, once built, was an extension of the shore of the Sabine River. *Travelers v. Shea*, ____F.2d ____(5th Cir. 1967) p. 11 — opinion.
>
> The ratio decindendi in those cases interpreting §903 (a) is a beacon to us here. *The coverage of the Act is not keyed to function but has uniformly been situs-oriented.* As our Court held in *O'Keefe v. Atlantic Stevedoring Company*, 5 Cir. 1965, 354 F.2d 48, 50:
>
> > 'The difficult problem is the determination as to the place where the injury occurred. It is the place where the injury occurred that determines whether there is Longshoremen's Compensation coverage.'
>
> *The Act does not cover all harbor workers, or all those working on ships, or those performing services to ships.* These words would be the actuating words if functionalism were to prevail over locus. Congress set out to cover workers not protected by state workmen's compensation laws. . . ." (emphasis supplied) *Travelers v. Shea*, supra, p. 3 — opinion.

The tort of "unseaworthiness" and concepts of "in the service of the ship" arise under the general maritime law and not under a specific enactment such as the Longshoremen's Act. They, unlike the Longshoremen's Act, are within the contemplation of the Admiralty Extension

Act. To contend that the Longshoremen's Act cover *all* harbor workers, *all* those working on ships, and *all* those performing services to ships does violence to Congressional intent and uniform judicial interpretation. Situs of injury, rather than abstract concepts of maritime function and "being engaged in maritime employment", is determinative of the petitioners' remedy. *O'Keefe v. Atlantic Stevedoring Company,* 354 F.2d 48 (5th Cir. 1965).

(2) An injury occurring upon the stationary floating outfitting pier, permanently affixed to land, is an injury upon a dock, wharf, pier or extension of land and is covered by State Compensation.

The entire evidence of probative force in this record is that any injury to the plaintiff on March 20, 1965, was sustained on a dock, wharf, or pier, which was stationary and permanently affixed to land, and not upon navigable waters of the United States, and, therefore, not within the meaning and coverage of the Longshoremen's and Harbor Workers' Compensation Act. The decision of the United States Court of Appeals for the Fifth Circuit agreed with this position and the Respondents submit that the opinion should be affirmed as it correctly states the existing law as it applies to the facts of the instant case.

Title 33 U.S.C. §903(a) defines the coverage and scope of the Longshoremen's and Harbor Workers' Act:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon navigable waters of the United States

> (including any dry dock) and if recovery for the disability or death through Workmen's Compensation proceedings may not validly be provided by state law."

The interpretation of this provision by the Courts has created the "twilight zone" to demark the scope and extent of the Longshore Act, i.e., whether federal or state compensation laws shall apply.

The cases in this area can be categorized by situs of the injury as follows:

(a) Injuries on dry docks—either floating or graven and marine railways, which the Courts have held generally to be within the coverage of the Longshore Act. *Avondale Marine Ways, Inc. v. Henderson* (1953) 346 U.S. 366 S.Ct. 100, 98 L.Ed. 77. One recent case has departed from the trend of the Courts of including marine railways within the parenthetical phrase "any dry dock" and correctly imposed a limit to further enlargement of longshore coverage. *O'Leary v. Puget Sound Bridge & Dry Dock Co.*, 349 F.2d 571 (9th Cir. 1965). This decision affirmatively indicates a limit to the outer boundaries of the Federal Compensation Act and a healthy vitality of the "twilight zone", i.e., that there remains a valid area to which state compensation benefits can and should be applied.

The court below correctly determined this issue:

> Appellees would have us liken this floating outfitting pier to a dry dock or to the land alongside a marine railway, since the pier can be used to repair a ship. Thus, they urge that we uphold the Deputy Commissioner's award. We have not, however, dealing with a dry dock or marine railway. A dry dock functionally

> as well as nautically is different from a floating barge. A dry dock lifts or shifts the ship. If it is to be a marine railway, it is hoisted upon land. If it is to be a dry dock, it submerges or fills with water. This floating barge does neither. . . ." *Travelers v. Shea,* ____F.2d____ (5th Cir. 1967) p. 11 — opinion.

(b) Those exceptional cases of the nature of *Interlake Steamship Company v. Nielsen,* 338 F.2d 879 (6th Cir. 1964) cert. den. 381 U.S. 934 and *Michigan Mutual Liability v. Arrien,* 344 F.2d 640 (2nd Cir. 1965) cert. den., 382 U.S. 835, which case their holdings allowing recovery upon isolated factual situations where injuries or death occurred in, upon, or above the waters and not upon the dock, pier or wharf.

Cases where workmen have fallen from docks, barges, piers or cat walks into navigable water and drowned as a result have followed the pattern established by *Interlake,* supra. *Gulf Oil Corporation v. O'Keefe,* 242 F. Supp. 881 (E. D. S. C. 1965); *Marine Stevedoring Corporation v. Oosting,* 238 F. Supp. 78 (E. D. Va. 1965); *Beasley v. O'Hearne,* 250 F. Supp. 49 (S. D. W. Va. 1966). It is argued by this Respondent that the *Interlake Steamship Company* line of cases is inapplicable to those fact situations where the injury occurs on a structure permanently used as a dock, wharf, or pier.

> This pier does not dwell in a penumbra, for the plethora of cases safely navigates us, by buoys and soundings, to land; that is, to the law governing injuries occurring on piers, wharves, or similar structures. We have no unique or exceptional factual situation before us. *Travelers v. Shea,* ____F.2d____ (5th Cir. 1967) P. 10-opinion.

(c) Those cases involving injuries on structures such as wharves, piers, and docks affixed permanently to shore traditionally have been held to be extensions of land and any remedies for injuries occurring on such structures have been held to be restricted to those afforded by local law—this despite the fact that the injured employee was employed by one who was subject to the Longshoremen's Act and was injured while loading, unloading, or otherwise concerned with the vessel. *Swanson v. Marra Brothers* (1946), 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045; *State Industrial Commission of State of New York v. Nordenholt Corporation* (1922), 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933; *American Export Lines, Incorporated v. Revel*, 266 F.2d 82 (4th Cir. 1959); *O'Keefe v. Atlantic Stevedoring Company*, 354 F.2d 48 (5th Cir. 1965); *Nicholson v. Calbeck*, 266 F. Supp. 103 (S.D. Tex. 1966) affd. per curiam by opinion rendered October 31, 1967, ____F.2d____ (5th Cir. 1967); *East v. Oosting*, 245 F. Supp. 51 (E.D. Va. 1965); *Johnson v. Traynor*, 243 F. Supp. 184 (D. Md. 1965).

In the *Nordenholt* case, supra, decided prior to the enactment of the Longshoremen's Act, the Supreme Court of the United States clearly held that an injury incurred by a longshoreman while engaged in unloading a vessel lying in navigable waters, who slipped and fell on dock, was a land injury, and, therefore, the recovery for such injury was covered by the state local compensation act, and not by general maritime law.

After enactment of the Longshoremen's Act, the Supreme Court of the United States reaffirmed the principle set out in the *Nordenholt* case, and adhered to it without deviation in *Swanson*. Eleven years after enactment of extension of Admiralty Jurisdiction Act of 1948, the Court

of Appeals for the 4th Circuit clearly and unmistakably stated in the *Revel* case, supra, that the *Nordenholt-Swanson* principle was still the law. Revel, a stevedore, was working on a pier when a load of drums fell onto the pier injuring him.

> "Since Revel was injured while standing on the dock (an extension of land), his remedies are restricted to those afforded by local law." *American Export Lines, Incorporated v. Revel,* 256 F.2d 82, 84 (4th Cir. 1959).

In *Johnson v. Traynor,* 243 F. Supp. 184 (D. Md. 1965), the claimants were engaged in loading drafts of steel into a vessel afloat in navigable waters from a railroad car on the surface of the pier. Both men were assigned and stationed in a railroad car. One such draft, while being lifted into the hold of the vessel, swung back, struck Klosek, and propelled him headfirst out of the gondola onto the pier. Johnson was pinned by the same draft against the gondola car. The pier on which the accident took place is permanently affixed to land, and its 600-foot surface extends over navigable waters.

> "In contrast to the myriad of cases holding that wharves, pilings, piers and like structures are extensions of land, *not one case has been cited by the claimants holding, or even suggesting, that a pier or similar structure could be considered not as being an extension of land but rather as being upon navigable waters.* Accordingly, this court holds that the High Pier at the Bethlehem Steel Plant at Sparrows Point is an extension of land and that the death and injury occurring thereon did not occur 'upon the navigable waters of the United States.' " 243 F. Supp. at page 188 (Emphasis supplied)

The companion cases of *East v. Oosting* and *Avery v. Oosting*, 245 F. Supp. 51 (E.D. Va. 1965), involved fact situations very similar to that of the *Johnson* and *Klosek* cases. In the *East* case, the petitioner was employed as a cargo checker upon a pier which projected out over water for a distance of 1,328 feet. The pier was supported by piles sunk into the river bed and was attached and connected to land. On the surface of the pier, East was struck on the leg by a bale of wool which had fallen off a forklift.

In the *Avery* case, the petitioner was employed as a longshoreman and was working in an open type of railroad car on the surface of a pier, hooking up logs. The claimant was struck by logs being lifted from the railroad car by the ship's gear. The pier is attached to land at one end and extends outward over the water of the Elizabeth River, thereby becoming an extension of land. In denying benefits under the Federal Longshoremen's and Harbor Workers' Compensation Act, the Court said:

> A wharf or pier is usually built on pilings over what was navigable water. When the structure is completed, the water over which it is built is permanently removed from navigation as if the structure had in the first instance been built of land. *East v. Oosting*, 245 F. Supp. 53, 54, citing *Michigan Mutual Liability Company v. Arrien*, 344 F.2d 640 (2d Cir. 1965), cert. den. 382 U.S. 835.

In *O'Keefe v. Atlantic Stevedoring Company*, 354 F.2d 48 (5th Cir., 1965), this Court considered a "dock" case with unique facts and causation of injury. In that case, a longshoreman was lifted from the dock by the gear of the ship, and was off the dock suspended by the ship's

boom. He was carried, head down, up and out from the dock. The winch operator, alerted by other employees, stopped the winch and the longshoreman dropped into the water between the dock and the vessel. When taken from the water he was dead. His skull had been fractured, but it was ascertained that the cause of death was drowning.

This Respondent would submit that the language of this decision places this case within the *Interlake Steamship* line of cases. It is, therefore, distinguishable from the instant case:

> "The difficult problem is the determination as to the place where the injury occurred. *It is the place where the injury occurred that determines where there is longshoremen's compensation coverage. If the ship's boom had swung over the dock striking and causing the death of Curry, we would not be able to find a basis for recovery under the Act. The place of the injury would have been the dock.* It is true that when the causal chain of events commenced, Curry was upon the dock and not upon navigable waters. But the beginning of the causal sequence was the lifting of Curry from the dock by the metal band suspended from the ship's boom. The boom was a part of the ship. Curry was lifted from the dock by the gear of the ship *and was, within the meaning of the Act, suspended from the ship. He was off the dock and upon navigable waters when injured,* and that is true whether his head struck the dock as he was lifted, or whether he struck the ship or the dock while swinging from the boom or after he was dropped. We are firmly of the view that Curry sustained his injury over navigable water." *Atlantic Stevedoring Company,* 354 F.2d at page 50 (Emphasis supplied).

Although the Court upheld the award, strong reservations were expressed that such an award could not have

been sustained if the place of the injury had been the dock. The language of this decision makes it apparent that the Courts intend to preserve traditional protection of injuries on docks, wharves, piers, and similar structures regarded as extensions of land for state compensation laws.

In the recent case of *Houser v. O'Leary*, 253 F. Supp. 417 (D. Ore. 1966), it was held that a longshoreman who fell over backwards from a railroad car onto the pier was not injured upon navigable waters. The pier ran approximately 1,100 feet along the river and extended on pilings 34 feet over the river.

> "Houser's argument has been uniformly rejected, most recently in an opinion by the Honorable Walter E. Hoffman, an able and distinguished trial judge from the Western District of Virginia, Norfolk Division. *East v. Oosting*, 245 F. Supp. 51 (W.D. Va 1965). See also *Johnson v. Traynor*, 243 F. Supp. 184 (D. Md. 1965). Cf. *Michigan Mutual Liability Co. v. Arrien*, 344 F.2d 640 (2 Cir. 1965). *These cases also reject the contention that the water under a pier is navigable within the meaning of the Act.*" *Houser v. O'Leary*, 253 F. Supp. 418 (Emphasis supplied).

This same result was also reached in the recent case of *Nicholson v. Calbeck*, supra, where the deputy commissioner had found as a fact that the waters underneath the pier in question were freely navigable by small crafts.

James McCollough was injured while working upon a 750-foot stationary floating pier which had been anchored to the bottom of Sabine River by clusters of piling for eighteen years. Its permanent home was in the water.

Neither water nor ships can go over the top of it. It does not submerge nor fill with water, i.e., function as a dry dock. A vessel or ship cannot go completely around it or under it. It is not hoisted upon land, i.e., function as a marine railway. The outfitting pier is not removed from the water periodically but remains permanently affixed to land. It is not in the nature of a "skid", nor easily removable from its location. This Respondent would urge that the waters below the 750-foot long outfitting pier were completely removed from navigation. *Michigan Mutual Liability Company v. Arrien,* supra.

The Bethlehem Steel high pier at Sparrows Point, Maryland, in the *Johnson* and *Klosek* cases, supra, extended out over and above navigable tidal waters for some 600 feet from shore. In *Avery,* supra, 1,000 feet; *East,* supra, 1,328 feet; *Houser,* supra, 34 feet. None of these cases emphasized how far the pier, dock or wharf extended over navigable waters. No distinction was made based on distance over water. All of these decisions focused primary concern on established precedent that a pier is an extension of land, that the waters beneath such a permanent structure are removed from navigation, and that, therefore, any injury upon a pier, dock or wharf is not compensable under the Longshore Act because it did not occur on navigable waters. These wisely-reasoned opinions were determinative of the result reached in the United States Court of Appeals for the Fifth Circuit.

James McCollough was not injured while working upon a drydock or marine railway within the meaning of the phrase "any drydock." He did not fall from the outfitting pier and suffer injuries in, upon, or above navigable waters within *Interlake Steamship Co. v. Nielsen,* supra, and its

progeny. He was not working upon a temporary, removable staging or skid. He was not injured as a result of being suspended by ship's gear, or while working upon or crossing a gangplank. The undisputed evidence shows the situs of the injury to be a permanently anchored structure or pier which was affixed to land, and the water thereunder removed from navigation.

> "The water under piers and wharves is, thus, substantially withdrawn from navigation; that under ships and gangways which occupy the space only temporarily, is not." *Michigan Mutual Liability Company v. Arrien,* 344 F.2d 640, 644 (2 Cir. 1965), cert. den. 382 U.S. 835.

(3) Proper jurisdiction within perimeter of State Compensation Coverage.

The effect of Title 33 U.S.C.A. §901 et seq. is to exclude from the jurisdiction of the Longshoremen's and Harbor Workers' Act injuries occurring on docks, wharves or piers permanently attached to land as these structures are validly covered by the state Workmen's Compensation Act. In the instant case, a claim was made under the Texas Workmen's Compensation Act before the Industrial Accident Board. That Board acquired jurisdiction, and money was paid to James B. McCollough under the terms and provisions of the Texas Workmen's Compensation Act. The Longshoremen's and Harbor Workers' Act does not apply if the state may afford compensation through a valid state act. The clear purpose of the Longshore Act is to give the states the first opportunity to compensate the employees for injuries through their state Workmen's Compensation Act where this may be validly done. The states are limited in extending or affording coverage to

employees injured on navigable waters where the work is of a maritime nature. This limitation or restriction would not apply to the instant case as the injury undisputedly occurred on a dock, wharf, or pier, permanently attached to land and thus an extension of land.

CONCLUSION

For the foregoing reasons, the petitioners' application for Writ of Certiorari should be, in all things, denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Respondents was mailed to the Hon. Ward Stephenson, Stephenson Building, Orange, Texas, Attorney for Petitioner, James D. McCollough, on the 5 day of Dec., 1967.

Louis Nelson